Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

and

CROPLIFE AMERICA, et al.,

Intervenor-Defendants

NO. C01-0132C

INTERVENOR-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

Note on Motion Calendar: Friday, April 2, 2004

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Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure, and Local CR 7(d)(3), Intervenor-Defendants CropLife America, et al. ("Intervenors") hereby move the Court for a stay pending appeal of its January 22, 2004 order ("2004 Injunction") granting further injunctive relief in this action. The 2004 Injunction enjoins, vacates, and sets aside the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")-registered uses of up to 54 pesticide active ingredients within defined buffer zones around "Salmon Supporting Waters." It also requires point of sale warnings and other measures for certain pesticide ingredients in urban areas.

As explained below, the Court has exceeded its jurisdiction, not only in entertaining plaintiffs' claims to begin with, but also in ordering unlawful and unjustified injunctive relief – even to the point of ordering mandatory relief against Intervenors who not only have not been found to be in violation of any law, but who have not even been *alleged* to be in violation. Usurping agency authority and reweighing the congressional balancing of interests enacted into the FIFRA and Endangered Species Act ("ESA") statutory schemes, the Court has improperly substituted its judgment for that of the authorized Legislative and expert Executive Branch officials in issuing sweeping injunctive mandates that will wreak havoc on small farmers and other innocent third parties whose livelihoods depend on the pesticide products in question. Numerous others will be irreparably injured as well, such as the farmworkers whose jobs will be lost, the local governments whose property tax base will be diminished, and the State and local agencies responsible for noxious weed control, highway maintenance and watershed restoration whose missions will be frustrated.

Given the at best questionable legal bases for the Court's orders, and the extraordinarily complex and scientifically uncertain technical regulatory scheme into which the Court has ventured with its orders, equity demands that the consequent infliction of so much harm on so many people be at least stayed until the court of appeals has had an opportunity to consider the propriety of those orders. At a minimum this Court should stay the 2004 Injunction in the

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interim until the court of appeals has had a chance to consider for itself whether the stay should be extended until the resolution of this appeal.

ARGUMENT

To obtain a stay of an injunction pending appeal, a moving party must show either "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply" in favor of the party subject to the injunction. *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988) (quoting *Los Angeles Mem. Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1201 (9th Cir. 1980)). Intervenors readily satisfy either standard here.

I. INTERVENORS AND DEFENDANTS HAVE RAISED SERIOUS QUESTIONS AND ARE LIKELY TO PREVAIL ON THE MERITS. THE 2004 INJUNCTION IS EXCESSIVE AND IS LIKELY TO BE REVERSED ON APPEAL

The most important factor in assessing a stay of the 2004 Injunction is whether it is likely to be reversed on appeal – whether there are serious questions the Injunction was issued in error. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-45 (D.C. Cir. 1977). The Injunction is very likely to be reversed on at least one of the following grounds.

A. Jurisdiction Is Lacking Over This Suit

This Court's underlying jurisdictional holding that "the APA [Administrative Procedure Act, 5 U.S.C. §§ 701-06], including its peculiar doctrines, does not govern plaintiffs' claims" (July 2002 Order at 5) is reversible error. "Judicial review of administrative decisions involving ESA is governed by section 706 of the APA." *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001).[1] This fundamental error infected the

[1] The APA applies to all federal agency actions except to the extent the APA has been "expressly" superseded. 5 U.S.C. § 559; *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Since the ESA citizen suit provision (16 U.S.C. § 1540(g)) does not describe the standards or a mode of review for federal ESA actions, normal APA principles apply to ESA suits against federal agencies. *E.g., Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 31 (1st Cir. 2001); *Cabinet Mts. Wilderness v. Peterson*, 685 F.2d 678, 685-86 (D.C. Cir. 1982).

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entire review process.

The APA waives the government's immunity from suit only for an "identifiable...'final agency action'" specifically named by the plaintiff. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 890, 894 (1990); *see* 5 U.S.C. §§ 702, 704. Plaintiffs bear the burden of proving that a justiciable controversy exists before an injunction can issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Neither the Complaint nor this Court's orders identify: (1) the affirmative final agency actions allegedly reviewable under 5 U.S.C. § 706(2); or (2) when and why EPA's alleged lack of "effects determinations" became actions "unreasonably delayed" for § 706(1) review purposes.[2] For example, Plaintiffs do not identify what documents before EPA on what date regarding pesticide impacts on salmon allegedly provided EPA with sufficient information on a specific pesticide's effects on listed salmon that it was arbitrary for EPA not to make a "may effect" determination and initiate ESA § 7 consultation under 50 C.F.R. § 402.14 or 402.16. Because the APA applies, these are the key issues, as reflected in Judge White's analysis in a similar pending case alleging ESA § 7 consultation delays on the effects of pesticides on the red-legged frog.[3] Thus, it was improper to engage in broad review of unidentified "ongoing

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[2] The July 2002 Order (at 8-9 and 11) and 2004 Injunction (at 2) review "ongoing actions" on "54 active ingredients," and maintain that "each pesticide registration constitutes an ongoing agency action" for ESA and judicial review purposes. The effect was to grant Plaintiffs the generalized judicial review of an agency's "day-to-day operations" prohibited by *Lujan v. NWF*, 497 U.S. at 891-94, 899. Cases alleging an unreasonable delay in action under § 706(1) are subject to the same constraints on identifying what made the action unlawfully delayed and against programmatic review under the United States' interpretation of the APA. The Supreme Court found this position to be meritorious enough to grant review in a case which will be decided this Term. *See* Brief for the Petitioners in *Norton v. S. Utah Wilderness Alliance*, No. 03-101 (filed Jan. 5, 2004) (available at http://www.abanet.org/publiced/preview/briefs/home.html). The 2004 Injunction should be stayed because it hinges on a broad judicial oversight role that is contrary to the APA, as the Supreme Court may again confirm.

[3] Without record information on the timing of FIFRA actions and ESA listings and what EPA knows about impacts on salmon and when it knew it, a court cannot decide whether ESA § 7 procedures were "unreasonably delayed" (5 U.S.C. § 706(1)) to the point there has been an APA violation that can be subjected to an injunction:

(footnote continued...)

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actions" and to issue a generic Injunction.

The exercise of jurisdiction over these Plaintiffs' sweeping Complaint also violates *Lujan v. NWF's* prohibition on programmatic judicial review and relief under the APA. Because judicial review and relief are limited to the specifically-identified "final agency action," Plaintiffs cannot obtain:

> *wholesale* improvement of this program by court decree, rather than in the offices of [EPA] or the halls of Congress, where programmatic improvements are normally made.... [Alleged] flaws in the entire "program"...cannot be laid before the courts for wholesale correction under the APA.... The case-by-case approach that this requires is understandably frustrating to an organization such as [Plaintiffs], which has as its objective across-the-board protection of our Nation's wildlife....

497 U.S. at 891-94 (emphasis in original); *Oxy USA, Inc. v. Babbitt*, 122 F.3d 251, 258 (5th Cir. 1997) (citizen suit provisions cannot be a "means of obtaining 'umbrella' review for a series of agency decisions").

(continued from previous page)

> Since each pesticide registration represents an independent agency action, and since the set of challenged pesticides contain a diverse set of chemicals likely to have a wide range of uses, modes of transport, and toxicological effects, the Court cannot lump all pesticides together, and must review each pesticide registration independently.... [EPA argues that its timing schedule complies with] *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984), which discusses judicial review of agency delay.... Regardless of whether those pesticides may affect the California red-legged frog, disputed issues of material fact remain about whether EPA's schedule constitutes compliance with § 7(a)(2).... Some of the registrations here at issue may have been approved *before* the California red-legged frog was listed, however, and thus registration would have preceded any consultation requirement. In such a situation, the ESA provides only general guidance about proper timing of consultation..... [T]he statute [and 50 C.F.R. § 402.16] does not set forth a specific timetable for initiating consultation following a new listing or the availability of new information. Some agency discretion must continue to exist, and the *TRAC* factors apply. Neither side has offered specific information about when the registrations of these twenty-four pesticides were most recently reviewed or about when EPA became aware of risks these pesticides potentially pose to the California red-legged frog. Accordingly, the Court lacks sufficient information to evaluate whether EPA's schedule constitutes compliance with the ESA. Summary judgment with respect to these twenty-four pesticides is denied.

Ctr. for Biological Diversity v. Whitman, No. C-02-1580 JSW, slip op. at 9-11 (N.D. Cal. June 30, 2003) (copy at Addendum A). The Ninth Circuit adopted the *TRAC* standards for determining whether there has been an unreasonable delay warranting an injunction in *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997).

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B. It Was Improper To Engage In Judicial Review And Issue An Injunction In The Absence Of An Administrative Record

The fundamental error that the APA does not apply resulted in this case in review and relief without EPA's administrative record. Yet, the APA does apply, and it does not permit judicial review unfettered by EPA's administrative "record," as required by 5 U.S.C. § 706. "The task of the reviewing court is to apply the appropriate standard of review...to the agency decision based on the record the agency presents to the reviewing court" – review cannot be based on "some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

Yet, the 2004 Injunction was instead based on dueling *post hoc* declarations from Plaintiffs', EPA's, and Intervenors' experts – and the Court declined to direct EPA to file the administrative record. July 2002 Order at 5 n.8 ("CropLife's demand for an administrative 'agency record' is misplaced"); Aug. 2003 Order at 10-21. This violates the foregoing law, as borne out in the Ninth Circuit's striking of extra-record declarations in ESA cases. *E.g., Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1450 (9th Cir. 1996).

More generally, the Court should not have "consider[ed] the merits at this time because in order to do so we require...the submission of an appropriate administrative record." *Alaska v. EPA*, 244 F.3d 748, 751 (9th Cir. 2001), *further proceedings*, 298 F.3d 814, 818 (9th Cir. 2002). The Injunction should be stayed until the administrative record is filed and until review of pesticide-specific facts can occur on that record.

C. Serious Questions Exist On Whether There Is A Remediable Violation

The 2004 Injunction is predicated on EPA's apparent failure to make explicit "effects determinations" under 50 C.F.R. § 402.13 on whether continuing 54 pesticide registrations "may affect" ESA-listed salmon. July 2002 Order at 14-15, 17 (directing relief only with

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respect to "effects determinations" and not directing ESA § 7 consultation).[4] The appellate court is likely to find it was improper to grant the *substantive* 2004 Injunction with respect to the *procedural* documentation violation of the Services' ESA § 7 rules for several reasons highlighted in this and following subsections.

First, the Solicitor General and all four Supreme Court Justices reaching the issue have concluded that the Services' ESA § 7 rules are "not binding" on federal agencies such as EPA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-69 (1992).[5] Hence, the Services' interpretive ESA § 7 rules, like other informal agency documents, create no judicially-enforceable law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-10 (1979).[6] The 2004 Injunction should be stayed and vacated, as it was issued based on the oxymoron of a "violation" of non-binding rules.

Second, there are serious questions over whether those rules have been violated. The Part 402 rules do not require written "effects determinations." Since ESA § 7 has "no 'retroactive' application...[to] any *prior* action of a federal agency" (*TVA v. Hill*, 437 U.S. 153, 186 n.32 (1978)), at least where a specific FIFRA registration preceded a particular salmon listing and EPA has taken no subsequent FIFRA reregistration action, EPA has considerable discretion over the timing of a "may effect" determination and initiation of some form of ESA

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[4] Depending on the result of an "effects determination," the agencies could decide that no ESA consultation is required, that informal consultation suffices, or that formal ESA consultation will be conducted. 50 C.F.R. §§ 402.13, 402.14. In the "effects determinations" to date, EPA has frequently found the pesticide would have no effects on listed salmon – hence, no further consultation is required. This is the likely result under FIFRA's protective scheme because EPA could not have initially registered a pesticide ingredient unless it found "it will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5).

[5] This occurs because ESA § 7(a)(2) states that "Each Federal agency" shall determine whether their actions comply with § 7(a)(2). The Services' "consultation" role does not allow them to issue legislative rules that bind other federal agencies. *See id.*; 16 U.S.C. § 1536(a)(2); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

[6] *See also Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547-48 (11th Cir. 1996) (ESA § 4(f) recovery plans lack the force of law); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996). Several decisions have assumed the 50 C.F.R. Part 402 rules are enforceable. They do not control when the previously-uncontested issue is contested in a later case. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992).

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consultation.[7] Thus, as Judge White found in a similar case, specific record facts regarding each pesticide ingredient and listed species must be analyzed and the *TRAC* factors must be applied before a court can opine on whether there has been an "unreasonable delay" which violates the ESA and APA and warrants an injunction. *See supra* note 3. This has not occurred in the case at bar. Hence, the finding of a legal violation and the 2004 Injunction are premature and not well supported.

D. Courts Can Only Award "Less Drastic" Relief For A Procedural Default, Which The 2002 Injunction Did. The 2004 Injunction Is Unlawful.

The July 2002 Order compels EPA to make the allegedly late "effects determinations" under a time schedule that "plaintiffs endorse," and to initiate ESA consultation if and when required. July 2002 Order at 17. This time deadline injunction – unlike the 2004 Injunction – was narrowly tailored to cure the only ESA-related violation found (delays in making "effects determinations").

By contrast, the contested 2004 Injunction unlawfully imposes *substantive* constraints on preexisting, *ongoing* actions (setting aside valid FIFRA registrations of 54 pesticide active ingredients in certain areas) for a *procedural* ESA violation without a finding the Injunction was needed to avoid serious injuries to listed salmon, much less to jeopardize the continued existence of an entire species, and where the Injunction contravenes Congress's balancing of the public interest in FIFRA § 6. Where an agency does not complete a task within a time deadline (here, an EPA "may effect" determination), courts may only grant the "less drastic" remedy of an injunction to "compel a decision" (here, compelling "effects determinations," which the July 2002 Order already did). *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392,

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[7] *See* 51 Fed. Reg. 19948 ("informal consultation is an optional process that is under the control of the Federal agency as to its initiation and duration"), 19949 (the "Service does not intend to mandate the timing of this [formal consultation] review, which is solely at the discretion of the Federal agency"), 19956 (reinitiation of consultation is not mentioned in ESA § 7 and the "Service notes its lack of authority to require Federal agencies to reinitiate consultation if they choose not to do so") (June 3, 1986).

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1400 (9th Cir. 1995); *see Brock v. Pierce County*, 476 U.S. 253, 260-62 (1986). An agency is "not required to suspend on-going" actions based on a deadline default, and a court "may not enjoin other activities based upon the failure" to timely prepare another document. *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110, 112-13 (8th Cir. 1997). Such ongoing actions do not become "ineffectual" or invalid. *Elings v. CIR*, 324 F.3d 1110, 1112-13 (9th Cir. 2003). Thus, it was improper for the 2004 Injunction to enjoin ongoing uses of pesticides earlier registered under FIFRA based only on a deadline default.[8]

Moreover, an injunction must be "narrowly tailored to give only the relief to which the plaintiffs are entitled." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). Since the July 2002 Order already granted a time schedule injunction that was narrowly tailored to the "delayed action" violation found and since Plaintiffs did not sustain their burden that additional relief was necessary (*see* below), the 2004 Injunction is excessive.

As matters of law and logic, nothing more than the "less drastic" time schedule injunction (which remedies the delayed "effects determinations") is warranted unless Plaintiffs sustain their burden of showing that earlier FIFRA-registered uses of pesticides will cause serious likelihood of extinction of listed salmon species. This is true under the general principle that extraordinary injunctive relief against a federal agency is disfavored, and should be granted only if supported by Plaintiffs' clear showing of irreparable injury and of the other factors governing injunctive relief. *E.g., Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-46 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-15 (1982); *Bernhardt v. Los Angeles County*, 339 F.3d 920, 930-32 (9th Cir. 2003).

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[8] The Aug. 2003 Order (at 5) rejected this point because it was made "[w]ithout citation" to case law. This brief provides the case law support. The Aug. 2003 Order (at 5) cites *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002), as supporting an interim substantive injunction. However: (1) that case concerned the National Environmental Policy Act ("NEPA"), whereas here ESA § 7 and FIFRA § 6 provide greater direction on interim injunctions; and (2) *Idaho Watersheds* affirmed the agency on interim relief (*see* 307 F.3d at 823), whereas here EPA opposed the relief granted.

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It is true that the ESA modifies injunctive relief principles somewhat. The ESA requires an injunction when needed to end a *substantive* ESA violation.[9] But, the ESA does not authorize whatever substantive injunction a plaintiff may choose for a *procedural* ESA violation. Instead, plaintiffs must show that their substantive injunction is necessary to fulfill the particular ESA "purpose" at issue and is necessary to avoid a future ESA violation. *Romero-Barcelo*, 456 U.S. at 314-20; *Southwest Ctr. for Biological Diversity v. U.S. Forest Service*, 307 F.3d 964, 971-73 (9th Cir. 2002), *withdrawn as moot,* 355 F.3d 1203 (9th Cir. 2004) ; *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002); *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994). In *Amoco Production*, the Supreme Court vacated the substantive injunction for a procedural default, stating that the "Ninth Circuit erroneously relied on *TVA v. Hill*," which involved a "distinguishable" situation where "it was conceded that completion of the dam would destroy the critical habitat of the snail darter" and destroy the snail darter itself. 480 U.S. at 543 n.9. In the case at bar, the 2004 Injunction is improper because the Court did not find that Injunction was necessary to avoid a future substantive violation of ESA § 7 (likely jeopardy to entire salmon species). Plaintiffs did not even attempt to make such a showing.

Further, the purpose of ESA § 7(a)(2), (b), and (d) is to preclude federal agency actions which are "likely to jeopardize the continued existence of" an entire listed species, but to allow non-jeopardizing actions to continue. 16 U.S.C. § 1536(a)(2). ESA § 7(d) controls the substantive constraints on ongoing actions once formal ESA consultation commences. The pre-consultation constraints at issue here on ongoing activities that may not even require

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[9] *E.g., TVA v. Hill*, 437 U.S. 153 (1978) (the purpose of ESA § 7 requires an injunction against future action of closing the Tellico Dam gates where it was admitted that action would substantively violate § 7 by causing extinction of the snail darter); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177-78 (9th Cir. 2002) (affirming a procedural time-deadline injunction for delayed ESA listing, but not substantively enjoining actions in the interim).

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consultation (*see supra* note 4) should be no broader.[10] Since an injunction is "appropriate...[only when] necessary to effectuate the congressional purpose behind the statute," ongoing action that is "*non-jeopardizing*...may take place during the consultation process in light of...Section 7(d) where the action will not result in substantive violations of the Act." *Southwest Center*, 307 F.3d at 971-73 (9th Cir. 2002).[11]

This explains why, in analogous situations involving prior and ongoing actions, Ninth Circuit courts have allowed prior and ongoing actions to continue in the absence of a showing they were causing serious harm to listed wildlife.[12] Thus, ESA § 7's purpose does not warrant the 2004 Injunction's constraints on FIFRA-registered uses of pesticides unless a

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[10] ESA § 7(d) controls on relief if and when formal consultation has been initiated. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994) ("new sales of timber"); *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987). Since "section 7(d) clarifies the requirements of section 7(a)(2), ensuring that the status quo will be maintained during the consultation process," ESA § 7(a)(2) and § 7(d) constraints should be equivalent. *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1998).

"Congress enacted § 7(d) to preclude the investments of large sums of money in any endeavor if...at the time of the investment there was a *reasonable likelihood that the project...would violate § 7(a)(2).*" *N. Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C. 1980) (emphasis added), *aff'd in relevant part*, 642 F.2d 589 (D.C. Cir 1980); *accord Bay's Legal Fund v. Browner*, 828 F. Supp. 102, 109 (D. Mass. 1993) (ESA § 7 requires cessation of construction only "when there is a 'likelihood' of an adverse impact to endangered species"). Section 7(d) "is more a restraint than a bar" – it restrains some new resource commitments during the consultation period to prevent "'steamrolling' a project towards completion during consultation," but it "*does not purport to close a project down.*" Houck, *The 'Institutionalization of Caution' under § 7 of the Endangered Species Act: What To Do When You Don't Know*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15001 (April 1982) (emphasis added). Thus, ESA § 7 does not support enjoining ongoing activities in the absence of substantial evidence the ongoing use is likely to jeopardize the continued existence of a listed species.

[11] Though *Southwest Center* was withdrawn on post-opinion mootness grounds (*see* 355 F.3d 1203 (9th Cir. 2004)), its reasoning is persuasive. That reasoning is supported by the other cases and analysis presented in the text.

[12] *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001) ("We did not suggest in *Houston* that once the renewed contracts were executed, the agency had continuing discretion to amend them at any time to address the needs of" newly listed species); *Sierra Club v. Marsh*, 816 F.2d at 389 (preserving the status quo at the time of the court's judgment and only "halt[ing] all [future] construction"); *Pac. Rivers Council v. Thomas*, No. 92-1322-MA, 1994 WL 908600 at *5-6 (D. Or. Oct. 20, 1994) ("ongoing rangeland activities.... may proceed pending completion of § 7(a) consultations"). There is no greater procedural violation here than in *Southwest Center* and *Pacific Rivers*, where many ongoing actions were not enjoined. In contrast to the law and equities in these *ongoing action* cases, in *proposed* action cases, courts have tended to enjoin the proposed future actions until § 7 compliance occurs. *Nat'l Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (awarding revised water contracts); *Pacific Rivers*, 30 F.3d at 1057 ("new sales of timber").

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preponderance of the evidence shows they are necessary to avoid likely jeopardy to the entire species of listed salmon.

Since that quantum of evidence does not exist, the 2004 Injunction is excessive and unlawful under ESA standards. This Court's grounds for not following this law are likely to be reversed on appeal. The Court reasoned that the "benefit of the doubt must go to protected species; the agency, not the species must bear the risk via institutionalized caution." Aug. 2003 Order at 9 and 11. That rationale conflicts with the APA's review standards (*see infra* note 13) and distorts the ESA and FIFRA regulatory schemes.

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original).[13] Hence, the legislative choices between protecting listed species and protecting the Nation's food supply that Congress made in FIFRA § 6 and ESA § 7 control on the situations in which pre-existing uses of pesticides can be suspended pending procedural compliance with ESA § 7. The Court was not authorized to reweigh for itself those competing considerations.

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[13] *See NWF v. Burlington Northern,* 23 F.3d at 1512 (Plaintiffs "expect more from the *TVA* case than its facts and holding will allow"); *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (it is "far-fetched" to say that the ESA compels courts and federal agencies to do "whatever it takes" to conserve listed species).

The "give the benefit of the doubt to the species" phrase comes from H.R. Conf. Rep. No. 96-697 at 12 (1979), 1979 U.S.C.C.A.N. 2572, 2576. In 1979, Congress lowered the standard for ESA § 7 compliance from the 1973 agency duty to "insure" that its proposed action "do[es] not jeopardize" a listed species to allowing an action that "is not likely to jeopardize" a listed species. *Compare* 87 Stat. 892 (1973) *with* 93 Stat. 126 (1979). Congress lowered the degree of certainty needed to satisfy ESA § 7 because "it is impossible to 'insure that an action will have no adverse effect. A more reasonable standard would be...[not] likely to adversely affect an endangered species." 125 Cong. Rec. 29437, 29439 (Oct. 24, 1979). The current ESA § 7(a)(2) "give[s] the benefit of the doubt to the species" only in the sense that, if it is equally likely that a federal action would or would not jeopardize the existence of the listed species, the federal action cannot go forward (as the agency could not "insure" that the action "is not likely to jeopardize"). It does not shift the burden of persuasion to Federal Defendants or prohibit ongoing actions that are not likely to jeopardize the continued existence of a listed species, even when there is a risk that some adverse impacts may occur. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992).

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The 2004 Injunction is based on presumptions and speculation, instead of evidence that pesticide use in the buffer zones injures salmon in the real world, much less jeopardize the very existence of entire salmon species. Hence, the Injunction violates the Supreme Court's guidance that the ESA not be implemented:

> on the basis of speculation or surmise.... [One ESA] objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

Bennett v. Spear, 520 U.S. 154, 176-77 (1997). The 2004 Injunction produces precisely this "needless economic dislocation," as the Department of Agriculture and EPA estimate the Injunction's buffer zones will cause *tens to hundreds of millions of dollars of crop losses annually*.[14]

The Court's other stated basis for this Injunction was that EPA should bear the "the burden to demonstrate that its ongoing actions are *non-jeopardizing*," and that EPA did not prove that negative. Aug. 2003 Order at 8-9, 11. This flipping of the burden of persuasion was in error. Under APA and ESA cases, a federal agency's actions are presumed lawful. Plaintiffs bear the burden of proving the action is unlawful.[15]

When the unwarranted shift in the burden of persuasion is removed, what is left are the

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[14] *See* Fed' Defs' Notice of Filing Supp. Ex. (Aug. 14, 2003) (providing the Dept. of Agriculture report on "Economic Impact of Spray Buffers on Agriculture in the Pacific Northwest" and a similar EPA report).

[15] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *FCC v. Schreiber*, 381 U.S. 279, 286 (1965); 5 U.S.C. § 556(d) ("the proponent of...an order has the burden of proof"). Thus, Plaintiffs bear the burden of showing an ESA violation, and the speculation on some adverse effects is not sufficient. *E.g.*, *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-27 (9th Cir. 2000); *Greenpeace*, 14 F.3d 1324, 1337 (9th Cir. 1992).

The near-impossibility of proving a negative is well known. For example, the district court rejected even Intervenors' detailed showing that FIFRA-registered uses of pesticides have not been shown to, and are highly unlikely to, cause serious injuries to listed salmon. Aug. 2003 Order at 13-15. In *Arizona Cattle*, the Ninth Circuit declined to read the ESA in a way that requires the Defendant to prove a negative ("to prove that the species does not exist" in an area) or that allows "widespread land regulation even where no [ESA] Section 9 liability could be imposed" or proven. 273 F.3d at 1240, 1244. That logic applies equally here. The 2004 Injunction unlawfully engages in "widespread land regulation" on where pesticides can and cannot be applied, without a showing that such applications substantively violate the ESA.

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Court's general allusions to some statements that *some* pesticides *might* pose *some* degree of concern over "potential" impacts on listed salmon. Aug. 2003 Order at 15-16. No real evidence of significant adverse effects observed in salmon was cited. The most that could be said was Plaintiffs raised "material issues of fact with respect to the substantial potential harm posed by EPA's ongoing actions." *Id.* at 16. Regardless of who bears the burden of persuasion, the bottom line is that there is not substantial evidence that the buffer zones, hazard warnings, and other elements in the 2004 Injunction are necessary to prevent serious injuries and risk of extinction to listed salmon. Without such evidence, the 2004 Injunction should be stayed and reversed.

This Court essentially rationalized that pesticide buffer zones would not hurt and might prevent speculative adverse impacts on listed salmon[16] (though at tremendous cost to the integrity of the FIFRA regulatory program and at tremendous cost to farmers, pesticide manufacturers and distributors). This "it wouldn't hurt and might help" rationale for limiting the use of pesticides crucial for crop production is insufficient under the public interest defined in ESA § 7, FIFRA § 6, and § 1010 of the 1988 ESA Amendments. *See infra* Section II. The 2004 Injunction improperly enjoined "all possible breaches of the" ESA and the "whole conduct of the defendants' business" in the buffer zones by barring essential agricultural uses of pesticides without a showing that this is necessary to prevent serious (let alone irreparable) injury to listed salmon. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945).

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[16] *See* 2004 Injunction at 1-2, 4 ("further injunctive relief is appropriate to prevent *potential* adverse effects of certain pesticide active ingredients on threatened and endangered salmonids"; "The Court finds that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy" to listed salmon); Aug. 2003 Opinion at 8-16 ("*possibly* [endangered] fish may be at risk" and concluding "there is little data that documents the effects of the proposed herbicide products" on salmonids and the conflicting "expert declarations raise *material issues of fact* with respect to the substantial *potential* harm posed by EPA's ongoing actions") (emphases added).

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E. The Mandatory Injunctive Relief Imposed On Intervenors In Connection With Urban-Use Pesticides Is Punitive and Unwarranted.

The 2004 Injunction (at 11) requires EPA to develop a point of sale hazard warning containing specific language and a "prominent graphic," and also requires Intervenors to distribute the notification, for point of sale distribution, to sales outlets where lawn and garden products are sold. Courts should be "extremely cautious" about issuing such mandatory injunctive relief, which should be denied "unless the facts and the law clearly favor the moving party." *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1319-20 (9th Cir. 1994).

The facts and the law – and basic equity – weigh *against* this mandatory injunctive relief, and particularly against imposing it on Intervenors. *The Court has found no violation of the ESA by any Intervenor.* There simply is no basis in the record for affirmatively enjoining Intervenors, under pain of contempt, to promulgate warnings and graphic visuals that discourage the use of the products they manufacture and sell. There has been no judicial ruling that the use of these products jeopardizes the existence of salmon species within the meaning of the ESA. It is premature to require, as a matter of *interim* relief, public "warnings" and signage about alleged hazards that may well not exist at all.

Moreover, the Court lacks jurisdiction under § 11(g) ESA, 16 U.S.C. § 1540(g), to enter injunctive relief against Intervenors. ESA § 11(g) only authorizes an injunction against a person who is "alleged to be in violation" of the Act, and who received sixty days' advance notice of the suit. As to Intervenors, this suit fails on both counts. First, the alleged violation of the Act –the *only* violation this Court has found – is EPA's *procedural* failure to comply with the consultation requirements of ESA § 7(a)(2) in the registration and re-registration of pesticides. *See* Aug. 8, 2003 Order at 5. Intervenors, as private entities, are not subject to § 7(a)(2) and therefore are incapable of violating it, because that provision applies only to actions by federal agencies. Thus, there has been and can be in this suit no finding of a violation of the ESA by any Intervenor. Second, no Intervenor received a sixty-day notice in

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advance of this suit. Since that notice is jurisdictional, *see Southwest Ctr. for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 520-21 (9th Cir. 1998), Plaintiffs cannot obtain citizen suit injunctive relief against Intervenors.

In addition, the hazard warning language and prominent graphic required by the 2004 Injunction conflict with FIFRA's labeling provisions, which are the cornerstone of EPA pesticide regulation. *See* 40 C.F.R. § 156.10. Registered pesticides must have EPA-approved labels. 7 U.S.C. § 136a(c)(1)(C), (c)(5)(B). FIFRA defines "label" and "labeling" broadly to include "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers" and "all labels and all other written, printed, or graphic material accompanying the pesticide . . . at any time" or "to which reference is made on the label or in literature accompanying the pesticide." 7 U.S.C. § 136(p)(1), (2). The injunction's requirement for written and graphic hazard warnings on pesticide packaging will throw existing EPA-approved product labels and labeling into a state of confusion. A manufacturer cannot alter a label without EPA's approval, which is a time-consuming process. Alteration of an EPA-approved label can result in civil or criminal penalties; so too can distributing or selling a product that is "misbranded" (i.e., "its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular"). 7 U.S.C. §§ 136(q), 136j(a)(1)(E), (a)(2)(A), 136*l*. The 2004 injunction not only bypasses the procedures for amending labels, but effectively misbrands the pesticides by requiring the inclusion of a hazard warning without any foundation that a hazard exists. Manufacturers who attempt to comply with this aspect of the Injunction would do so at the risk of possible FIFRA criminal and civil sanctions for misbranding.

In sum, whether the Court agrees that Intervenors have demonstrated a likelihood of probable success on the merits, it must acknowledge at least that "serious questions [have been] raised," *Tribal Village*, 859 F.2d at 663. As shown below, those "serious questions" combine with the public interest and the probability of irreparable injury to call for issuance of a stay

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pending appeal.

II. THE PUBLIC INTEREST FACTORS FAVOR A STAY: FIFRA § 6 CONTROLS ON THE STANDARDS FOR THE *DE FACTO* "SUSPENSION" OF PESTICIDE USES IN THE 2004 INJUNCTION. THE INJUNCTION UNLAWFULLY DIRECTS EPA AND OTHERS TO VIOLATE FIFRA.

Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero-Barcelo*, 456 U.S. at 312 (vacating an injunction against a federal agency). Congress defines the public interest in the statutes it enacts. *Amoco Production*, 490 U.S. at 545-46 (reversing an injunction for failure to consider the statutory public interest in mineral development; irreparable environmental injury cannot be presumed); *TVA v. Hill*, 437 U.S. at 194. The balance of the public interests in food production and in protecting ESA-listed species that Congress struck in FIFRA and § 1010 of the 1988 ESA Amendments renders the 2004 Injunction insupportable.

FIFRA § 6 and ESA § 7 can and should be read harmoniously to avoid a disfavored conflict between the statutes on permissible injunctive relief. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). FIFRA § 6 specifies that EPA can compel "suspension" of a "registration of the pesticide immediately" or create a "change in classification" where "necessary to prevent an imminent hazard during" the longer "time required for cancellation or change in classification proceedings." 7 U.S.C. § 136d(c)(1), (2). The FIFRA § 6 standard for an interim "suspension" of a pesticide use – "*unreasonable hazard to the survival of a species declared endangered or threatened...[under] the Endangered Species Act*," 7 U.S.C. § 136*l* (emphasis added) – both refers to the ESA and is functionally identical to the ESA § 7 constraint against likely jeopardy to the continued existence (the survival) of a listed species.[17] Thus, FIFRA § 6 and ESA § 7

[17] *See* 50 C.F.R. § 402.02 (definition of "jeopardize the continued existence of"). Thus, FIFRA § 6 "illuminates" the meaning of the consistent ESA § 7 with respect to relief in the nature of suspending pesticide uses. *See Rucker v. Davis*, 237 F.3d 1113, 1121-22 (9th Cir. 2001) (*en banc*), *vacated on other grounds*, 535 U.S. 125 (2002). Further, since the FIFRA definition of "imminent hazard" was *amended by the 1973 ESA*, Congress in the ESA amendment to FIFRA has declared that the public interest lies in not enjoining or suspending a pesticide *(footnote continued...)*

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direct both agencies and courts to use a standard in assessing a motion to effectively suspend some FIFRA-registered uses of pesticides that is sensitive to food production interests and that allows a pesticide use to be suspended only upon proof it is causing serious injuries to listed salmon.

The 2004 Injunction is a *de facto* FIFRA § 6 suspension of FIFRA-authorized uses of pesticides. It directs EPA to suspend immediately the existing registrations and label authorizations to use 54 pesticide active ingredients in buffer zones and urban areas. The Injunction does so in a manner inconsistent with FIFRA § 6's standards and procedures. Plaintiffs did not demonstrate, nor did the Court find, an "unreasonable hazard to the survival of" a listed species, which is the substantive standard for a FIFRA § 6 suspension.[18] Thus, *the Injunction directs EPA to violate FIFRA*. That is unlawful.

Because FIFRA § 6 provides Congress's balancing of the public interests with respect to suspensions of pesticide uses, the standards in FIFRA § 6 control on a court's ability to issue a *de facto* suspension for several reasons. A court cannot order relief not specifically provided

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(continued from previous page)
use in the absence of persuasive evidence that the use poses an "unreasonable hazard to the survival of" a listed species. 7 U.S.C. § 136*l*; *see* Pub L. No. 93-205 § 13(f), 87 Stat. 884, 903 (1973).

The public policy embedded in FIFRA § 6 is that the use of FIFRA-registered pesticides to produce food and fiber should not be constrained absent a convincing basis that a particular pesticide use is causing an unreasonable hazard to survival of a listed species. Congress expressed this policy when § 1010 of the 1988 ESA Amendments directed EPA to design its ESA compliance program for FIFRA to "minimize the impacts to persons engaged in agricultural food and fiber commodity production." 102 Stat. 2313 (1978), 7 U.S.C. § 136a note. The legislative intent was that "[a]griculture is a major part of the U.S. economy and provides nutritional sustenance for our population and exports abroad.... [Federal agencies shall] implement the [ESA] in a way that protects endangered and threatened species while minimizing, where possible, impacts on production of agricultural foods and fiber commodities." H.R. Conf. Rep. No. 100-928, at 24-25 (1988), 1988 U.S.C.C.A.N. 2738, 2741-42.

[18] Once EPA registers the authorized uses of a pesticide, a registrant has specific *regulatory rights* to manufacture and distribute that pesticide, and the public has the right to continue to use that pesticide in accordance with label instructions. *E.g.*, 40 C.F.R. § 152.130(a) and (f). Moreover, FIFRA's due process protections – such as notices, hearings, continued use of existing stocks, and authorizing judicial review only after EPA has taken a suspension action – are also cast aside by the Injunction. 7 U.S.C. §§ 136d(c), 136n.

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for in another Act's "comprehensive" scheme.[19] *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 482-83, 487-88 (1996). Since "Congress provided precisely the remedies it considered appropriate" in FIFRA with respect to ESA-listed species, this Court lacked authority to issue the 2004 Injunction that is inconsistent with the FIFRA § 6 remedy (where that Injunction is not dictated by a specific substantive ESA violation). *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981).[20]

Additionally, a general statute (the ESA) cannot be used to displace the standards and procedures required under a specific statutory provision. *Secretary of the Interior v. California*, 464 U.S. 312, 343 (1984). The Ninth Circuit has found a more specific statute controls over ESA § 7 in several cases,[21] and is likely to do so with respect to FIFRA § 6 as well.

Finally, here, where there is no substantive violation of a clearly overriding ESA duty, the supplemental nature of the ESA (*see* 16 U.S.C. § 1531(c)(1)) only allows a court to order EPA to implement the ESA in a manner that also complies with FIFRA.[22] Similarly here,

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[19] "FIFRA is a comprehensive regulatory scheme aimed at controlling the use, sale, and labeling of pesticides." *Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1204 (9th Cir. 2002). FIFRA § 6 provides an "elaborate framework" for suspending a previously-registered use of a pesticide to prevent an "imminent hazard" to an ESA-listed species. *Love v. Thomas*, 858 F.2d 1347, 1350-58 (9th Cir. 1988). Congress would not have modified FIFRA § 6 by means of the 1973 ESA unless it had intended for the more specific FIFRA provisions to apply.

[20] *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90-94 (2002) (courts and agencies must respect the limits on the remedies that Congress has enacted); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979) ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

[21] *See Tinoqui-Chalola Council v. U.S. Dep't of Energy*, 232 F.3d 1300, 1306 (9th Cir. 2000); *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d at 1449. In contrast, where the ESA or another statute prescribes a remedy on a point on which FIFRA does not purport to be comprehensive, the ESA may control. *E.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1298-1303 (8th Cir. 1989).

[22] The ESA "does not *expand* the powers conferred on an agency by its enabling act" – it does not supersede "limitations on FERC's authority contained in the [Federal Power Act]" and authorize a court or an agency to do "whatever it takes" to conserve a listed species. *Platte River*, 962 F.2d at 34. The Ninth Circuit "agree[d]" with *Platte River*'s proposition that, because no non-ESA "statutory provision...would allow the BLM to breach its agreement with Seneca," the ESA does not supply the missing statutory authority. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995). "The upshot is that EPA cannot invoke the ESA as a means of creating and imposing

(footnote continued...)

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where there is no substantive ESA violation, the ESA does not authorize a court to breach FIFRA by directing the suspension of a pesticide use in a manner inconsistent with FIFRA § 6.

In addition, a stay pending appeal is in the public interest in other ways, as well. Without a stay, many jobs will be lost in agriculture and the local property tax bases diminished as farms and orchards are forced either to scale back or shut down their operations. *See, infra*, Part III, and supporting declarations. The missions of State and local governmental units dedicated to noxious weed control, watershed restoration, and related public purposes will also be frustrated. For example, the Grant County Soil and Water Conservation District's Grant Weed Control unit ("Grant County") will be unable to control noxious weeds not only on the 13,000 to 15,000 acres it is responsible for that are within the 20-yard buffer zone, but beyond as uncontrolled noxious weeds spread to the rest of its 2,688,000 acres, damaging highway roadbeds and shoulders, as well as agricultural lands; moreover, the Upper John Day Basin's successful, ongoing program of watershed restoration will suffer a "major setback" as the buffer zone restrictions "will jeopardize years of watershed restoration." Declaration of Jason Kehrberg, ¶ ¶ 4-10.

Grant County and private timber managers also attest to the adverse biologic consequences of the buffer zone prohibitions. *See* Kehrberg Dec. ¶ 9 ("Increased noxious weeds along waterways will reduce vegetation important to many species of wildlife."); Sohn Declaration ¶ 9 ("loss of future large wood material recruitment currently desirable for improved salmon habitat," *inter alia*).

In sum, the public interest favors a stay pending appeal to determine whether the 2004 Injunction is valid.

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requirements that are not authorized by the" agency's organic laws. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998).

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III. THE INJUNCTION MAY CAUSE IRREPARABLE HARM TO INTERVENORS AND OTHERS

The injunction will irreparably harm not only EPA's interest in administering and implementing FIFRA (*see supra* Section II), but also the private business and economic interests of Intervenors and others who manufacture, distribute, sell, or rely upon the pesticide products subject to the injunction. This harm takes two primary forms:

First, growers and other users of pesticide products will be irreparably harmed by the main component of the 2004 Injunction – the imposition of the 20-yard and 100-yard buffer zones adjacent to salmon-supporting waters. Imposition of the buffer zones will take significant acreage out of production, with losses projected by the U.S. Department of Agriculture in the range of *tens to hundreds of millions of dollars annually.*[23] Once the growing season passes – indeed, as the spring planting and treatment season is forced to begin without the pesticide protections critical to modern agriculture – these losses cannot be recouped and therefore constitute irreparable harm. As the accompanying irreparable harm declarations (from but a tiny fraction of those injured by the 2004 Injunction) starkly illustrate, the imposition of the buffer zones will wreak substantial havoc on the agricultural communities of this region:

- Kameron Miller expects the "total ruination" of his 10-acre pear and cherry orchard which is the primary source of his family's income, a loss of $30,000 per year, and the need to lay off one full-time employee. Miller Decl. ¶ ¶ 9-12.
- Lori Pavlicek anticipates laying off two full-time employees from her farm, and annual losses exceeding $140,000, not counting the additional costs that will be required to maintain "clean ground" for producing crops outside the buffer zone. Pavlicek Decl. ¶ ¶ 13-15.

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[23] *See* Fed' Defs' Notice of Filing Supp. Ex. (Aug. 14, 2003) (providing the Dept. of Agriculture report on "Economic Impact of Spray Buffers on Agriculture in the Pacific Northwest" and a similar EPA report).

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- Martin Vincent will be put out of the cranberry business altogether because 100% of his cranberry bog is within the 20-yard buffer, and commercial cranberry farming is impossible without the fungicides they are now prohibited from using there. Vincent Decl. ¶ ¶ 4-7.
- Rick Sohn, President of Lone Rock Timber Co., projects annual losses of $198,000 as a result of the severe reduction in productivity of his Douglas Fir acreage. Sohn Decl. ¶ ¶ 6-8.
- Edmond Duyck expects to suffer an annual loss of $66,000 due to the damage to his hazelnut, corn, and wheat crops and, in future years, that the cumulative effects of insect infestation will "jeopardize [his] entire farm." Duyck Decl. ¶ ¶ 9-11.
- Alan Schreiber, Executive Director of the Washington Asparagus Commission, projects that 500 acres of asparagus on five to seven farms in his state will likely be forced out of production due to uncontrolled aphid infestations because "disulfoton is fundamentally essential to continued production of asparagus in Washington," resulting in economic losses of approximately $10 million, and a loss of 175 seasonal jobs and 50 post harvest jobs. Schreiber Decl. ¶ ¶ 5-8.
- Loren Vanderzanden anticipates losing $40,000 per year in gross income from his grass seed farm because of the 20-yard buffer zone and fears that it will be a continuous source of contamination which would ultimately result in the loss of his entire crop which cannot be sold unless it meets the 98% weed-free standard customers require. Vanderzanden Decl. ¶ ¶ 4-8.
- Charlotte Barker's 1100-acre cattle ranch is threatened by noxious weeds for which she knows of no other effective controls, and which can ruin entire fields, poisoning cattle and eliminating native plant communities. Barker Decl. ¶ ¶ 1, 5-8.

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- Thomas Auvil's entire apple orchard could be lost along with the jobs of four full time employees, if he cannot treat the 20-yard buffer zone, because not only is there zero tolerance for codling moths in many export markets, but the warehouse will reject his whole crop if there is too much damage. Auvil Decl. ¶¶ 5-8.

As these declarations, as well as those submitted by Washington Farm Bureau demonstrate, the 2004 Injunction threatens substantial and imminent irreparable harm to numerous growers, ranchers, and others, and to the employees whose jobs will be lost; and also to the communities dependent on them and vulnerable to the ripple effects these losses will engender.

Second, Intervenors will suffer irreparable harm to their business reputations and good will from the required public dissemination of hazard warning notifications and graphic concerning the products they have registered under FIFRA and manufacture, sell and distribute. Harm to business reputation is well-recognized as unquantifiable and therefore irreparable. *See, e.g., Rent-a-Center, Inc. v. Canyon Television and Appliance, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Regents of the Univ. of California v. Am. Broadcasting Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984). *See also Florida Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5th Cir. 1981) (collecting cases). In this case, the injunction requires EPA to develop, and Intervenors to disseminate, damaging information on pesticide products concerning alleged "hazards" that have not been shown to exist, and that may indeed be found not to exist (as has been the case with some urban-use pesticides already). Once that public alarm bell has been heard, it cannot be unrung. Thus, a stay of the mandatory provisions on urban-use pesticides is necessary to prevent irreparable harm to the business interests of Intervenors and others in these products.

* * *

In sum, the 2004 Injunction should be stayed because: (1) it is likely to be vacated on

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appeal for lack of jurisdiction or on the ESA, FIFRA, and injunctive relief merits; (2) it is contrary to the public interest as defined by, and purpose of, ESA § 7 and FIFRA § 6; and (3) Intervenors and others will suffer irreparable harm in the absence of a stay.

CONCLUSION

Intervenors' motion for stay pending appeal should be granted.

DATED this 17th day of March, 2004.

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